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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SYLVIA LOSTAL, HYMAN and LORRAINE SPIERS, BERENICE ROSENBERG and HELEN GALIPIDI,
Plaintiffs-Petitioners,

—against—

MANVILLE CORPORATION, JOHNS-MANVILLE CORPORATION, JOHNS-MANVILLE SALES CORPORATION, JOHNS-MANVILLE PRODUCTS CORPORATION, UNARCO INDUSTRIES, INC., formerly known as UNION ASBESTOS & RUBBER CO., EAGLE PICHER INDUSTRIES, INC., SOUTHERN TEXTILE CORPORATION, formerly known as SOUTHERN ASBESTOS CORPORATION, H. K. PORTER COMPANY, INC. RAYBESTOS-MANHATTAN, INC., OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, KEENE CORPORATION, CELOTEX CORPORATION, G.A.F. CORPORATION and NICOLET INDUSTRIES, INC.,
Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Does the admiralty and maritime jurisdiction of the district courts extend to product liability claims asserted by workers injured by exposure to asbestos while engaged in the traditional maritime activities of construction and repair of vessels in navigable waters?

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SLYVIA LOSTAL, HYMAN and LORRAINE SPIERS, BERENICE ROSENBERG and HELEN GALIPIDI,

Plaintiffs-Petitioners,

—against—

MANVILLE CORPORATION, JOHNS-MANVILLE CORPORATION, JOHNS MANVILLE SALES CORPORATION, JOHNS-MANVILLE PRODUCTS CORPORATION, UNARCO INDUSTRIES, INC., formerly known as UNION ASBESTOS & RUBBER CO., EAGLE PICHER INDUSTRIES, INC., SOUTHERN TEXTILE CORPORATION, formerly known as SOUTHERN ASBESTOS CORPORATION, H. K. PORTER COMPANY, INC., RAYBESTOS-MANHATTAN, INC., OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, KEENE CORPORATION, CELOTEX CORPORATION, G.A.F. CORPORATION and NICOLET INDUSTRIES, INC.,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners Sylvia Lostal, Hymen and Lorraine Spiers, Bernice Rosenberg and Helen Galiardi seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered October 5, 1984, holding that the Admiralty Jurisdiction of the United States does not extend to claims of shipyard workers for injury and death resulting from exposure to asbestos while on navigable waters.

Opinions Below

The opinion of the Court of Appeals is unreported and appears at pages 1a to 4a of the Appendix. The opinion of the District Court is unreported and appears in relevant portions at pages 5a to 12a of the Appendix.

Jurisdiction

The judgment of the Court of Apeals was entered on October 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statement of the Case

These actions were commenced on behalf of individuals who, while engaged in the historic maritime activity of construction and repair of vessels, were exposed to asbestos-containing materials, contracted asbestos-related disease and in some instances died. Although construction and repair of vessels in and upon navigable waters has historically been deemed by this Court to be an activity over which admiralty jurisdiction lies, the Court of Appeals nonethelesss dismissed the actions for want of admiralty jurisdic-

tion under 28 U.S.C. §1331(1). As will be developed below, the ruling of the Court of Appeals conflicts with a recent decision of this Court, which confirmed that admiralty principles continue to govern situations involving injury to workers engaged in maritime construction—a historic maritime activity. Then too, the conclusion of the Court of Appeals is in conflict with the express ruling of the Fourth Circuit upholding admiralty jurisdiction over claims exactly akin to those involved here.

In short, review by certiorari is necessitated by both the existence of a conflict among the circuits, and a conflict between the ruling of the Court of Appeals and the guiding decisions of this Court.

REASONS FOR GRANTING THE WRIT

POINT I

The ruling of the Court of Appeals is in conflict with the decisions and analysis of this Court.

a. Claims for injury sustained during construction and repair of vessels have historically been cognizable in admiralty.

For many years, it was often said that the existence of admiralty jurisdiction over tort actions turned solely upon whether the injury occurred upon navigable waters. The "general doctrine that . . . admiralty jurisdiction depends . . . in tort matters upon the locality has been so frequently asserted by this Court that it must now be treated as settled." *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469, 476 (1922); *The Plymouth,* U.S. (3 Wall.) 20, 33 (1866). Simply put, if the injury occurred on navigable waters, admiralty jurisdiction existed.

Yet, there is some question whether this Court ever squarely held "that a maritime locality is the sole test of admiralty tort jurisdiction." *Executive Jet Aviation, Inc.* v. *Cleveland,* 469 U.S. 249, 258 (1972). As some authorities have pointed out, even the age-old cases upholding "admiralty jurisdiction exacted a showing of something more [than mere locality], a maritime connection of some sort. . . ." *Hubschman* v. *Antilles Airboats, Inc.,* 440 F. Supp. 828, 836 (D.V.I. 1977); *see* Comment, *Admiralty Jurisdiction Airplanes and Wrongful Death in Territorial Waters,* 64 Colum. L. Rev. 1084.

It is particularly significant, then, that claims for injuries arising from the construction and repair of vessels in navigable waters have, from the earliest days, been held to be within the admiralty jurisdiction. As to ship construction, this Court long ago settled the question "whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state;" "we answer, yes." *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U.S. 469, 477-478 (1922). In a similar fashion, the Court has repeatedly held that a tort "suffered by one doing repair work on board a completed vessel" is "maritime" in nature and has a "direct relation to navigation and commerce." *Robins Dry Dock & Repair Co.* v. *Dahl,* 266 U.S. 449, 457 (1925); *accord, e.g., Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U.S. 479, 481 (1923).

To the extent that the test for admiralty jurisdiction always required some nexus with traditional maritime activity, these early cases establish that construction and repair of vessels qualifies as such an activity. More important is the explicit recognition in the decisions of the traditional existence of admiralty jurisdiction over injuries incurred in the course of construction and repair of ships.

Without any question, therefore, the claims interposed by petitioners in these actions—relating to injuries received while constructing and repairing vessels—are historically within admiralty jurisdiction. And, the 1972 decision in *Executive Jet* does not and was not intended to suddenly divest admiralty courts of this historic jurisdiction. To the contrary, historic maritime matters remain maritime in nature, as this Court has confirmed in its recent decisions in the area.

b. The Court has confirmed that historic maritime matters remain maritime matters.

Only recently, this Court addressed an issue closely akin to that involved here, and ruled that modern decisions in the maritime area do not divest an historic maritime activity of its maritime flavor. In that case, *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates,* 459 U.S. 297 (1983) (hereinafter *Perini North*), an employee involved in building a sewage treatment plant was injured while working on a cargo barge in the Harlem River.

Traditionally and historically, there would have been no doubt that the employee, as a maritime construction worker injured upon navigable waters, would have been covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.* Like admiralty jurisdiction generally, the test for LHWCA application turned upon whether the locale or situs of the injury was upon navigable waters. *Id.* In 1972, however, Congress added a "status" element requiring some connection between the employment and navigation and commerce for LHWCA coverage to attach. *See Northeast*

Marine Terminal Co. v. *Caputo,* 432 U.S. 249, 264-265 (1977). That status element is virtually identical to the general maritime jurisdiction requirement, also formulated in 1972 in *Executive Jet,* of a "significant relationship to traditional maritime activity." *Executive Jet,* 409 U.S. at 273.

Applying that new status requirement in *Perini North,* the Second Circuit had originally found the LHWCA inapplicable to the worker, even though he would have been traditionally covered under the Act, because of an alleged lack of a nexus between his job and navigation and commerce. Notably, the reasoning of Second Circuit in *Perini North* is identical to its ruling here that workers engaged in shipbuilding and repair lack a connection to traditional maritime activity. It is significant, then, that after granting certiorari in *Perini North,* this Court reversed the judgment of the Second Circuit.

In the course of its opinion, the Court made two points of especial significance. First, the Court held that the "status" element did not and was not designed to remove from the ambit of the LHWCA activities and individuals to which the statute traditionally applied. Instead, the "status" test was meant to limit the expansion of coverage into new and non-traditional areas. 459 U.S. 297, 74 L.Ed. 2d at 482 & n.29.

Second, and even more important, the Court drew a parallel to general admiralty jurisdiction and the *Executive Jet* status test. And, the Court indicated that the *Executive Jet* "status" element was formulated to serve a narrow purpose, limiting the expansion of general admiralty jurisdiction in cases where it was wholly fortuitous that the injury occurred on navigable waters: "The explicit language of *Executive Jet* makes it clear that our discussion was occasioned by 'the problems inherent in

applying a locality-alone test of admiralty tort jurisdiction' . . . in a situation where 'the fact that an aircraft happens to fall in navigable waters, rather than on land, *is wholly fortuitous.*'" 459 U.S. 297, 74 L.Ed. 2d at 481-485 & n. 29. Of course, the employee in *Perini North,* "was by no means 'fortuitously' on the water when he was injured" and therefore the status test of *Executive Jet* was inapplicable. *Id.*

In rather clear-cut, straight-forward language, the Court thus has indicated that the "status" or "nexus" requirement of *Executive Jet* did not divest admiralty courts of jurisdiction over claims which would traditionally be heard in admiralty. Indeed, even prior to *Perini North,* a numberp of courts had recognized that *Executive Jet* did not overturn historic, existing admiralty jurisdiction. See, *e.g., Kelly* v. *United States,* 531 F.2d 1144, 1146-1147 (2d Cir. 1976); *Earles* v. *Union Bourge Line Corp.,* 486 F.2d 1097, 1100-1101 (3d Cir. 1973); *Hubschman* v. *Antilles Airboats, Inc.,* 440 F. Supp. 828, 840-841. Since there is no question but that claims of injury stemming from construction or repair of a ship in navigable waters are historically within the admiralty jurisdiction, that historic jurisdiction was not uprooted by *Executive Jet.*

c. Application of the status test confirms the propriety of exercising admiralty jurisdiction.

It is a fundamental tenet of admiralty law that where an injury occurs on navigable waters, admiralty jurisdiction is not displaced merely because the negligence or wrongful conduct originated or took place on land. *E.g., Kelly* v. *United States,* 531 F.2d 1144, 1146 (2d Cir. 1976); *Jig The Third Corp.* v. *Puritan Marine Insurance Underwriters Corp.,* 519 F.2d 171 (5th Cir. 1975). And, as the

circuits have generally recognized, "*Executive Jet* did not reject that traditional rule . . ." *Kelly* v. *United States,* 531 F.2d at 1146. Indeed, were the rule otherwise, there could be no assertion of product liability claims in admiralty, which could be contrary to the plethora of authority upholding such claims. *E.g., Pan-Alaska Fisheries, Inc.* v. *Maritime Construction & Design Co.,* 565 F.2d 1129 (9th Cir. 1977); *Sperry-Rand Corp.* v. *Radio Corp. of America,* 618 F.2d 319 (5th Cir. 1980); *Lindsay* v. *McDonnell-Douglas Aircraft Corp.,* 460 F.2d 631 (8th Cir. 1972); *White* v. *Johns-Manville Corp.,* 662 F.2d 234, 239 (4th Cir. 1981) *cert. denied,* 454 U.S. 1163 (1982).

It follows, therefore, that in assessing whether a particular situation bears a significant relationship to traditional maritime activity, the focus must be upon the activity of the injured party and not upon the land-based conduct of the manufacturer. Simply stated, "the 'activity' whose relationship to traditional maritime [is] to be examined [is] that of the injured party, not that of the tortfeasor." *Union Oil Co.* v. *Oppen,* 501 F.2d 558, 561 (9th Cir. 1974); *accord, e.g., Sperry-Rand Corp* v. *Radio Corp. of America,* 618 F.2d 319, 321 (5th Cir. 1980); *Jig The Third Corp.* v. *Puritan Marine Insurance Underwriters Corp.,* 519 F.2d 171 (5th Cir. 1975); *Hubschman* v. *Antilles Airboats, Inc.,* 440 F.Supp. at 841. And, as previously demonstrated, there is no doubt that the activity of workers in constructing, repairing and overhauling ships was historically within the ambit of admiralty jurisdiction. That alone would be sufficient to satisfy the "status" test.

Although such workers may not be entitled to the maritime warranty of seaworthiness, or to the remedy of maintenance and cure, that does not prevent their activities from falling within historic maritime jurisdiction. Demonstrating that admiralty jurisdiction is not confined to those

entitled to such remedies is a recent decision of this Court upholding maritime jurisdiction over claims made by individuals engaged in pleasure boat activities—individuals who without question were not entitled to any warranty of seaworthiness or maintenance and cure. *Foremost Insurance Co.* v. *Richardson,* 457 U.S. 668 (1982).

There are yet other connections between the installation of asbestos materials into ships and traditional maritime activity. In the first place, the asbestos products to which the workers were exposed either previously had been or were in the process of being incorporated into the ship itself. Quite literally, therefore, the injury causing substance was or became an appurtenance to the ship. *Cf. Victory Carriers, Inc.* v. *Law,* 404 U.S. 202 (1971) (no admiralty jurisdiction for a land-based injury because the injury causing material was not an appurtenance to nor stored on board the ship). And, although asbestos did not have an exclusive maritime application, the products used in shipyards "were designed, advertised and marketed [specifically] as maritime asbestos products." *White* v. *Johns-Manville Corp.,* 662 F.2d at 240. In short, the products had and were designed to have particular application for maritime use and were in fact widely used in the maritime industry.

That the material was an essential part of the ship is manifest; without insulation, and without the shipyard workers, there could have been no maritime industry. Finally, insofar as petitioners are concerned, the product was utilized, and petitioners were exposed to it, upon navigable waters. These facts, coupled with the historic existence of admiralty jurisdiction over injuries to maritime construction workers, makes out not just a significant but a compelling nexus to traditional maritime activity.

Even if the status test is rigorously applied, therefore, the connection to traditional maritime activity is beyond question.

* * *

In view of this Court's recent pronouncements that the status test in admiralty was not designed to upset traditional maritime jurisdiction, and the historic maritime flavor of the petitioners' claims, there is a plain conflict between the ruling of the Court of Appeals and the decisions of this Court. Certiorari should therefore be granted to resolve the conflict and settle the law in this area.

POINT II

There is a conflict among the circuits and the ruling in *White* v. *Johns-Manville* upholding admiralty jurisdiction in a similar situation is in harmony with this Court's analysis.

As the Second Circuit acknowledged, its decision is squarely in conflict with the Fourth Circuit ruling in *White* v. *Johns-Manville Corporation,* 622 F.2d 234 (4th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982) sustaining admiralty jurisdiction over asbestos claims arising out of construction and repair of vessels upon navigable waters. The *White* Court perhaps anticipated, and surely rendered a decision wholly consistent with, the later opinion in *Perini North.* On the other hand, the principal cases which suggest or hold that admiralty jurisdiction does not exist were decided without the benefit of *Perini North,* or without any express analysis of the effect of that ruling. *See, e.g., Harville* v. *Johns-Manville Corp.,* 731 F.2d 775 (11th Cir. 1984); *Lowe* v. *Ingalls Shipbuilding,* 723 F.2d 1173 (5th Cir. 1984); *Austin* v. *UNARCO Industries, Inc.,* 705

F.2d 1 (1st Cir.) *cert. dismissed,* 104 S.Ct. 34 (1983); *Owens-Illinois* v. *United States District Court,* 698 F.2d 967 (9th Cir. 1983). Without the *Perini North* decision—which holds that traditional maritime claims are not displaced by the so-called "status" test—the courts were unable to analyze the issues under the appropriate and controlling law.

If for no other reason, then, this Court should grant certiorari to settle the conflict and provide a measure of uniformity throughout the country. In the final analysis, though, it is the ruling of the Fourth Circuit in *White* that is in harmony with the principles announced by the Court.

CONCLUSION

Given the conflict among the circuits, and the divergence between this Court's precedents and the ruling of the Second Circuit, review by certiorari is necessitated to provide a settled, uniform rule of decision.

Respectfully submitted,

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Certificate of Service

Donald I. Marlin, a member of the firm of Kreindler & Kreindler, attorney for plaintiffs-petitioners, and a member of the bar of this Court, certifies that on the 3rd day of January, 1985, copies of the foregoing Petition for a Writ of Certiorari were served by mail upon all parties required to be served, by placing same in the first class service of the United States Post Office:

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APPENDIX

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

(Filed—October 5, 1984)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of October, one thousand nine hundred and eighty-four.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE RALPH K. WINTER,
Circuit Judges,

HONORABLE CHARLES E. WYZANSKI,
District Judge,
sitting by designation.

SLYVIA LOSTAL, individually, and as Special Administratrix of the Estate of CANDIDO LOSTAL, *et al.*,

Plaintiffs-Appellants,

—against—

MANVILLE CORPORATION, JOHNS-MANVILLE CORPORATION, JOHNS MANVILLE SALES COR-

Judgment of Affirmance of the United States Court of Appeals

PORATION, JOHNS-MANVILLE PRODUCTS CORPORATION, UNARCO INDUSTRIES, INC., formerly known as UNION ASBESTOS & RUBBER CO., EAGLE PICHER INDUSTRIES, INC., SOUTHERN TEXTILE CORPORATION, formerly known as SOUTHERN ASBESTOS CORPORATION, H. K. POTTER COMPANY, INC., RAYBESTOS-MANHATTAN, INC., OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, KEENE CORPORATION, CELOTEX CORPORATION, G.A.F. CORPORATION and NICOLET INDUSTRIES, INC., *et al.*,

Defendants-Appelles.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Judgment of Affirmance of the United States Court of Appeals

1. Appellant shipyard workers claim the district court improperly dismissed their complaint, predicated on 28 U.S.C. § 1333(1), for lack of subject matter jurisdiction. Section 1333(1) provides the federal district courts with jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction." Admiralty jurisdiction in tort exists where the wrong (1) took place on navigable waters ("situs") and (2) "bear[s] a significant relationship to traditional maritime activity" ("status"). *See Executive Jet Aviation, Inc.* v. *City of Cleevland,* 409 U.S. 249 (1972); *Keene Corp.* v. *Uinted States,* 700 F.2d 836 (2d Cir.), *cert. denied,* 104 S.Ct. 195 (1983). In determining whether there exists a significant relationship to traditional maritime activity, courts must consider the functions and roles of the parties, the types of vehicles and instrumentalities involved, and the causation and type of injury. *See Keene Corp., supra,* 700 F. 2d at 844; *Harville* v. *Johns-Manville Products Corp.,* 731 F.2d 775, 784-86 (11th Cir. 1984); *Austin* v. *Unarco Industries, Inc.,* 705 F.2d 1, 13-14 (1st Cir.), *petition for cert. dismissed,* 104 S.Ct. 34 (1983); *Owens-Illinois, Inc.* v. *United States District Court for the Western District of Washington at Tacoma,* 698 F.2d 967, 970-71 (9th Cir. 1983). The shipyard workers did not engage in inherently maritime occupations, but rather were doing jobs of landsmen (Welders, machinists); the instrumentalities central to their claims—asbestos-containing products and the lack of safety equipment—do not possess maritime attributes; and the causation and types of their injuries are indistinguishable from the same injuries occurring in landbased settings. This Court

has expressly held that injuries cauesd by exposure to asbestos fibers, regardless of where that exposure occurs, do not bear a significant relationship to traditional maritime activity and, therefore, are not cognizable under Section 1333(1). *See Keene Corp., supra,* 700 F.2d at 844-45. The shipyard workers' contention that *White* v. *Johns-Manville Corp.,* 662 F.2d 243 (4th Cir. 1981), *cert. denied,* 454 U.S. 1163 (1982), is dispositive of their claims is unavailing, since the reasoning of that case has explicitly been rejected by this Court. *See Keene Corp., supra,* 700 F.2d at 844-45. Similarly, the shipyard workers' reliance on *Director, Office Workers' Compensation Programs* v. *Perini North River Assoc.,* 459 P.S. 297 (1983) is misplaced. That case addressed jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, which extends jurisdiction to all "persons engaged in maritime employment." Jurisdiction pursuant to Section 1333(1) is limited to "wrongs [that] bear a significant relationship to traditional maritime activity." Therefore, the district court's dismissal of the shipyard workers' complaint, pursuant to Fed. R. Civ. P. 12(b)(1), for failure to establish a significant relationship between the alleged tortious wrong and traditional maritime activity was proper.

2. Accordingly, the judgments of the district court are affirmed.

IRVING R. KAUFMAN

RALPH K. WINTER

Circuit Judges,

CHARLES E. WYZANSKI

District Judge.

Relevant Portions of the Memorandum Decision and Order of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Master File No. MF-1

IN RE EASTERN DISTRICT OF NEW YORK ABESTOS LITIGATION

THIS DOCUMENT RELATES TO:

All Cases

SIFTON, District Judge.

These consolidated actions[1] were commenced by plaintiffs, who allege, *inter alia,* that they or their decedents were Brooklyn Naval Shipyard workers engaged in various occupations relating to the construction and repair of ships who were exposed to asbestos-containing products in the course of their employment and who contracted as-

[1] By order of the Chief Judge of this court, all of the asbestos-related actions in this district were consolidated for administrative purposes and assigned to the undersigned. There are presently pending before this Court twenty-nine asbestos-related actions.

bestos-related diseases as a result of the exposure. Defendants are alleged to be, *inter alia,* manufacturers, producers, suppliers, and distributors of the asbestos-containing products to which plaintiffs or their decedents were exposed.

The matter is before the Court on a motion by the defendants for an order pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the complaints in these consolidated actions for lack of subject matter jurisdiction, except in those actions where jurisdiction is based upon diversity of citizenship and, as to those, striking all allegations of subject matter jurisdiction other than diversity.[2] In addition, defendants move for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure

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[2] Motions to dismiss the complaint have been filed by two separate groups of defendants. Defendants GAF Corporation, Celotex Corporation, Fiberboard Corporation, H.K. Porter Company, Inc., Owens-Corning Fiberglass Corp., and other defendants joining this group filed the motion referred to in the text. Defendants Pittsburgh Corning Corporation, Keene Corporation, Keene Building Products Corporation and defendants joining this group have filed a separate motion to dismiss the complaints for lack of subject matter jurisdiction or, alternatively, to have this Court certify for appeal, pursuant to 28 U.S.C. §1292(b) the issue of whether these cases lie within this Court's admiralty jurisdiction. This second group of defendants takes the position that the sole jurisdictional basis for plaintiffs' claims is admiralty jurisdiction. *See* Brief in Support of Motion to Dismiss, Feb. 25, 1983, at p. 1. However, as will be discussed in more detail in the text, several plaintiffs have alleged bases of subject matter jurisdiction other than admiralty. At the same time, those plaintiffs alleging alternative bases of jurisdiction have not joined issue on these alternative jurisdictional grounds.

granting summary judgment in four actions[3] on the ground of *res judicata.*

MOTIONS TO DISMISS FOR LACK OF JURISDICTION

Plaintiffs allege jurisdiction based, *inter alia,* on 28 U.S.C. §1333(1) which provides that the federal district courts have original and exclusive jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction."

The test for determining admiralty jurisdiction in tort, as set forth by the Supreme Court in *Executive Jet Aviation Corp.* v. *City of Cleveland,* 409 U.S. 249, 254-61 (1972), requires that the wrong (1) take place on navigable waters ("situs") and (2) "bear[s] a significant relationship to traditional maritime activity" ("status").

For purposes of the instant motion only, defendants assume, without conceding the point, that each plaintiff can satisfy the locality rule of "status" requirement of the *Executive Jet* test. The only issue with respect to plaintiffs' claim of admiralty jurisdiction, therefore, is whether the wrong alleged bears a significant relationship to traditional maritime activity.

The parties agree that the issue whether plaintiffs' claims of injury sustained during construction and repair of vessels in or upon navigable waters are within this Court's admiralty jurisdiction turns on the scope of the Second

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[3] The actions are *Rosenberg* v. *Johns-Manville Products Sales Corp. et al.* (CV-81-3941); *Galiardi* v. *Manville Corp. et al.* (CV-82-0804); *Galiardi* v. *Fiberboard Corp et al.* (CV-82-3440); *Leventhal* v. *Johns-Manville Products Corp. et al.* (CV-82-1486).

Circuit's recent decision in *Keene Corp.* v. *United States*, 700 F.2d 836 (2d Cir. 1983) (*"Keene"*).

Keene involved a suit for indemnity and contribution by an asbestos manufacturer against the United States Government for, *inter alia*, designing and specifying asbestos products and failing to inspect the workplace. In determining that the acts and omissions alleged were not sufficiently related to traditional maritime activity, the Second Circuit made note of two factual elements not present in the instant case:

> "First, *Keene* does not allege that its insulation was designed for maritime use. . . . Second, many of the roles attributed to the government and allegedly giving rise to Keene's cause of action—the government's sale of asbestos to Keene, its specification of asbestos as a component of insulation it purchased from Keene, its alleged breach of its duty to inspect the work place, its obligations as a promulgator of health regulations—do not bear a significant relationship to traditional maritime activities such as 'navigation and commerce.'"

Keene, supra at 844.

As plaintiffs note, there is a difference between the government's role as alleged in *Keene* as a product designer and suppplier of raw asbestos and the defendants' role in the instant actions as manufacturers and suppliers of finished asbestos products. Thus, plaintiffs argue that, while the raw asbestos supplied by the government might be used as well for non-marine as well as marine purposes, the products supplied by the defendants in the instant actions, although not used exclusively in maritime applica-

tions, were designed for martime use. In response to questioning at oral argument, plaintiffs' counsel stated that proof would be put before a finder of fact to establish that the defendants had designed, advertised, and marketed their products as marine asbestos products. Finally plaintiffs in the instant actions allege that they or their decedents were involved with the marine application of these products in the course of ship construction and repair in shipyards and aboard vessels and, in at least one instance, while at sea.[4]

This sort of proof was held by the court in *White* v. *Johns-Manville Corp.*, 662 F.2d 234, 239 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1037 (1982) ("*White II*), to establish admiralty jurisdiction over injured shipyard workers' claims. Nonetheless, as Judge Blumenfeld noted in a case involving similar asbestso-related claims:

> "In considered dicta in the recent case of [*Keene*], 700 F.2d 836 (2d Cir. 1983), the Second Circuit expressly declined to follow the reasoning in *White II* that shipyard worker claims implicate traditional concepts of maritime law or other reasoning in other situations in cases cited there finding admiralty jurisdiction. 700 F.2d at 844-45. I am not inclined to disregard such emphatically expressed views that admiralty jurisdiction does not exist in the context of these claims. In addition, the decision to deny admiralty jurisdiction is well buttressed by a very thorough and scholarly opinion by Judge Coffin in

[4] Plaintiff Cullen (78 C 2237) alleges that her decedent was exposed to asbestos products while at sea. Complaint ¶17 and 18; Oral Argument, June 2, 1983.

> the First Circuit in *Austin* v. *Unarco Industries,* No. 82-1168 (1st Cir. March 30, 1983), although its method of analysis differs somewhat from that in *Keene.*"[5]

In re General Dynamics Asbestos Cases, No. CML No. 1 and *Morency* v. *Raybestos-Manhattan, Inc., et al.,* Civil No. M-82-491 (D. Conn. April 22, 1983).

For the reasons attributed to by Judge Blumenfeld, I conclude that asbestos-caused injuries to shipyard workers of the type sought to be proved in these cases are not a traditional concern of admiralty law and, accordingly, that this Court lacks admiralty jurisdiction over plaintiffs' claims.

Various plaintiffs allege, in addition to admiralty jurisdiction, one or more of the followign bases of subject matter jurisdiction: diversity of citizenship (28 U.S.C. §1332); federal question (28 U.S.C. §1331); Longshoremen's and Harbor Workers' Compensation Act ("LHW CA") (33 U.S.C. §§901 *et seq.*); and the Admiralty Juris-

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[5] The *Keene* decision focuses largely on whether there was any maritime flavor to the manufacture or supply of the offending asbestos product and concludes that there was not. However, as the First Circuit notes in *Austin* v. *Unarco Industries, Inc.,* No. 82-1168, slip op. at 18-20 (1st Cir. March 30, 1983), courts have extended admiralty jurisdiction to product liability cases in which manufacturers did not explicitly intend or know that their products would be put to maritime use. *See Sperry Rand* v. *RCA,* 618 F.2d 319 (5th Cir. 1980); *Pan Alaska Fisheries Inc.* v. *Marine Construction & Design Co.,* 565 F.2d 1129 (9th Cir. 1977). The First Circuit's analysis in *Austin* focuses on plaintiff's rather than defendants', activities and concludes that these activities are not the traditional concern of admiralty law.

diction Extension Act ("AJEA") (46 U.S.C. §740). As noted, *supra,* certain defendants have moved to strike these alternative jurisdictional allegations except those alleging diversity of citizenship as lacking any merit. As to those actions in which diversity of citizenship is alleged, defendants state that they propose to make applications for summary judgment dismissing the claims asserted as time-barred.

Plaintiffs have, to date, failed to respond to that portion of defendants' application which seeks to strike the alternative jurisdictional allegations other than diversity, and as a result, issue has not been joined on this aspect of the motions. Accordingly, plaintiffs are directed to show cause in writing within 30 days of the date hereof why the relief requested by defendants with respect to jurisdictional allegations other than diversity should not be granted. Defendants are directed to make motions returnable at the same date seeking summary judgment with regard to plaintiffs' claims based on diversity. Until issue has been joined with respect to these alternative bases for jurisdiction, the matter is not ripe for consideration of whether certification to the Court of Appeals is appropriate. For the reasons stated earlier, that portion of defendants' application which seeks to dismiss claims based on admiralty jurisdiction is granted.

For the reasons stated, defendants' motion to dismiss is granted with respect to jurisdictional allegations based on admiralty jurisdiction, 28 U.S.C. §1333(1) (Rosenberg, Leventhal, and Galiardi New York federal and Texas federal actions) and with respect to jurisdictional claims based on diversity in the Rosenberg and Leventhal actions. Defendants' motion to dismiss is denied with respect to the

allegations of diversity contained in the Texas federal action (CV-82-3440).

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
October 13, 1983

CHARLES P. SIFTON
United States District Judge

FILED
FEB 5 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84 - 1090

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SYLVIA LOSTAL, HYMAN and LORRAINE SPIERS, BERENICE ROSENBERG and HELEN GALIARDI,

Plaintiffs-Petitioners,

—against—

MANVILLE CORPORATION, JOHNS-MANVILLE CORPORATION, JOHNS-MANVILLE SALES CORPORATION, JOHNS-MANVILLE PRODUCTS CORPORATION, UNARCO INDUSTRIES INC., formerly known as UNION ASBESTOS & RUBBER CO., EAGLE-PICHER INDUSTRIES, INC., SOUTHERN TEXTILE CORPORATION, formerly known as SOUTHERN ASBESTOS CORPORATION, H. K. PORTER COMPANY, INC., RAYBESTOS-MANHATTAN, INC., RAYMARK CORPORATION, RAYMARK INDUSTRIES, INC., OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, PITTSBURGH-CORNING CORPORATION, KEENE CORPORATION, G.A.F. CORPORATION and NICOLET INDUSTRIES, INC.,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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COUNTER-STATEMENT OF QUESTION PRESENTED

Do the traditional state law claims of asbestos-related torts alleged by plaintiffs-petitioners -- land-based shipyard workers -- bear the significant relationship to traditional maritime activity which is a necessary predicate to admiralty jurisdiction and to the invocation of the specialized rules of federal admiralty law?

The district court and the court of appeals answered in the negative.

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NO. 84 - 1090

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SYLVIA LOSTAL, HYMAN and LORRAINE SPIERS, BERENICE ROSENBERG and HELEN GALIARDI,

Plaintiffs-Petitioners,

-against-

MANVILLE CORPORATION, JOHNS-MANVILLE CORPORATION, JOHNS-MANVILLE SALES CORPORATION, JOHNS-MANVILLE PRODUCTS CORPORATION, UNARCO INDUSTRIES, INC., formerly known as Union Asbestos & Rubber Co., EAGLE-PICHER INDUSTRIES, INC., SOUTHERN TEXTILE CORPORATION, formerly known as Southern Asbestos Corporation, H. K. PORTER COMPANY, INC., RAYBESTOS-MANHATTAN, INC., RAYMARK CORPORATION, RAYMARK INDUSTRIES, INC., OWENS-ILLINOIS CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, PITTSBURGH-CORNING CORPORATION, KEENE CORPORATION, G.A.F. CORPORATION and NICOLET INDUSTRIES, INC.,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari from a judgment of the United States Court of Appeals for the Second Circuit, filed October 5, 1984, which affirmed judgments of the United States District Court for the Eastern District of New York (Sifton, D.J.) dismissing the complaints in these actions for lack of subject matter jurisdiction.

All four petitioners alleged that they were shipyard workers engaged in various occupations and activities relating to construction and repair of ships.* All alleged they were exposed

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* The persons alleged to have been exposed to asbestos-containing products are deceased in three of the four cases: Lostal, Rosenberg, and Galiardi. For the sake of brevity, references to "petitioners" include all relevant persons allegedly exposed to asbestos-containing products.

to asbestos-containing products in the course of this employment.

Respondents* moved in the district court to dismiss the complaints for lack of jurisdiction over the subject matter. By a memorandum decision and order dated October 13, 1983 (partially reproduced at 5a-12a**), the district court held that shipyard workers' asbestos-

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* Each respondent's respective corporate parents, subsidiaries (other than wholly owned subsidiaries) and affiliates are set forth in the Appendix hereto.

**References such as (5a) are to pages of the Appendix attached to the Petition for a Writ of Certiorari. The judgments in Lostal, Spiers and Rosenberg are dated April 9, 1984. By an order of the court of appeals dated June 22, 1984, after the Joint Appendix had been filed in that court, the appeal from the judgments in Lostal, Spiers and Rosenberg was consolidated with the appeal in Galiardi.

caused injuries, of the sort alleged here, are not a traditional concern of admiralty law. The district court held that it lacked admiralty jurisdiction over petitioners' claims. (10a).

By order filed October 5, 1984, the court of appeals unanimously affirmed the district court's ruling. In affirming, the court of appeals reiterated its prior express holding in Keene Corp. v. United States, 700 F.2d 836 (2nd Cir.), cert. denied, __ U.S. __, 104 S.Ct. 195 (1983), that injuries caused by exposure to asbestos fibers, regardless of where the exposure occurs, do not bear a significant relation to traditional maritime activity and are thus not cognizable under the district court's admiralty jurisdiction. (3a-4a).

REASONS FOR DENYING THE WRIT

A. THE COURT OF APPEALS WAS CORRECT IN RULING THAT PETITIONERS' CLAIMS ARE NOT WITHIN THE DISTRICT COURT'S ADMIRALTY JURISDICTION.

1. The Limits of Federal Admiralty Tort Jurisdiction: Executive Jet Requires a Maritime Locality Plus a Significant Relationship to Traditional Maritime Activity.

Federal admiralty jurisdiction eas its genesis in the Constitution of the United States, U.S. CONST., Art. III, §2, and is vested in the district courts by statute, 28 U.S.C. §1333, which gives them

> . . . original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Historically, the boundary between maritime and non-maritime tort cases turned on the fortuity of the locality of the wrong: "If the wrong occurred on navigable waters, the action [was] within admiralty jurisdiction; if the wrong occurred on land, it [was] not." Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) ("Executive Jet"). The "locality" rule, as this principle is known, has been traced to the earliest days of the Republic and was defined by this Court in The Plymouth, 3 Wall. 20, 35, 18 L.Ed. 125 (1866), which remained the authoritative statement of the locality rule for more than a century. Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971).

When the locality rule was the sole criterion for admiralty tort jurisdiction, it was often criticized for its fortuitous nature. In Professor Black's words, it meant that the Constitutional term "cases of admiralty and maritime jurisdiction" was delimited "not on the basis of clear practical relation of the included or excluded cases to the business of navigation and transport, but on the basis of considerations of historical accident." Black, Admiralty Jurisdiction: Critique and Suggestions, 50

Colum. L. Rev. 259, 266 (1950).* In 1972, this Court reexamined the locality rule in Executive Jet and adopted a new rule of admiralty jurisdiction over torts.

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* See also E. Benedict, The American Admiralty 173 (1850); 7A J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice, ¶¶44.325[3] and 44.325[5] (2d ed. 1972); and American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 233 (1969) ("The federal courts should not be burdened with every case of an injured swimmer."). Petitioners incorrectly state that some maritime nexus was always required for admiralty tort jurisdiction (Petition, p. 4). Courts and scholars may have criticized the locality rule as the sole criterion for admiralty jurisdiction, but locality was plainly the only question upon which admiralty jurisdiction turned prior to Executive Jet. Grant-Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 475 (1922); Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971); Executive Jet, 409 U.S. at 253-54.

In Executive Jet, the Court analyzed the history and purposes of federal admiralty jurisdiction and concluded that the mere fortuity of whether a tort occurs on or over navigable waters is not -- by itself -- a sufficient basis for characterizing it as a "maritime" tort:

> [I]n determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.

409 U.S. at 261.

The Court laid down a new test of admiralty jurisdiction over torts: in addition to the locality rule, which remained intact, "the wrong [must] bear

a significant relationship to traditional maritime activity." 409 U.S. at 268.*

The Court offered examples of the "traditional maritime activity" to which a significant relationship must be shown to exist:

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules -- rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty

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* Any lingering doubts that the "locality" plus "significant relationship" rule of Executive Jet applies to torts generally, and not only to aviation torts, was put to rest in Foremost Insurance Co. v. Richardson, 457 U.S. 668, 673 (1982).

> looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

409 U.S. at 269-70. These examples reflect areas where the needs of an interstate and international maritime commerce require the expertise of special admiralty courts and the uniformity of federal admiralty law. It is the need for that expertise and that uniformity -- "its aptness for providing a special-industry court for the maritime industry"* -- which is the essence of admiralty jurisdiction. Foremost

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* G. Gilmore and C. Black, The Law of Admiralty §1-10, p. 30 (2d ed. 1975).

Insurance Co. v. Richardson, 457 U.S. 668, 674-75 (1982).

2. Concerns of Federalism Require a Cautious Approach in Construing the Limits of Of Admiralty Jurisdiction.

In Executive Jet, this Court emphasized that the purpose of the "significant relationship to traditional maritime activity" test was to reserve to the states their traditional jurisdiction over those torts "only fortuitously and incidentally connected with navigable waters." 409 U.S. at 273. The Court thus reiterated a concern about adhering to fundamental principles of federalism which it had restated just a year earlier in Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971). In Victory Carriers, the Court observed

that in determining whether to expand admiralty jurisdiction, "we should proceed with caution . . . ." Id. The Court warned against intrusions by federal courts upon the independence of state governments. 404 U.S. at 212 (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)). As we demonstrate at pp. 20-28, infra, petitioners' claims have no significant relationship -- indeed, no relationship at all -- to traditional maritime activity.

Principles of federal maritime law -- not state law tort principles -- govern all cases where admiralty jurisdiction does lie [see, e.g., G. Gilmore and C. Black, supra, §§1-17, 1-18, at 47-51; Austin v. Unarco Industries, Inc., 705 F.2d 1, 6 n.1 (1st Cir.),

petition for cert. dismissed, __ U.S. __, 104 S.Ct. 34 (1983); Harville v. Johns-Manville Products Corp., 731 F.2d 775, 778 (11th Cir. 1984)], whether in federal district courts or in state courts under the "savings to suitors" clause of 28 U.S.C. §1333. Thus, if admiralty jurisdiction were available to persons who allegedly inhaled asbestos fibers in shipyards, then federal maritime law, not the states' tort laws, would govern all shipyard asbestos cases, regardless of forum. It is precisely this sort of preemption of substantive state law which dictates "proceeding with caution" and rejecting the potentially enormous expansion of federal admiralty jurisdiction sought by petitioners.

3. The Courts of Appeals Have Overwhelmingly Rejected Admiralty Jurisdiction in Cases Arising Out of Exposure to Asbestos-Containing Products, Even in Maritime Localities.

In Keene Corp. v. United States, 700 F.2d 836 (2nd Cir.), cert. denied, __ U.S. __, 104 S.Ct. 195 (1983) ("Keene"), the court of appeals for the Second Circuit had previously ruled that injuries caused by the alleged inhalation of asbestos fibers -- whether or not in a maritime locality -- are not cognizable under admiralty jurisdiction because, under the Executive Jet test, they do not bear a significant relationship to traditional maritime activity. Keene at 844-45.

The court of appeals had underscored its conclusion -- that the hazards of exposure to asbestos, regard-

less of where that exposure took place, simply do not bear a significant relationship to traditional maritime activity -- by expressly rejecting the reasoning of White v. Johns-Manville Corp., 662 F.2d 243 (4th Cir. 1981), cert. denied, 454 U.S. 1163 (1982) ("White II"), the only case in which any circuit court of appeals has upheld admiralty jurisdiction over personal injury claims of shipyard workers who allegedly inhaled asbestos fibers. Keene at 844-45. The authority of Keene and the express rejection of White II were reiterated by the court of appeals in the instant cases. (4a).

While the Fourth Circuit was the first court of appeals to consider the question, every other court of appeals,

in addition to the Second Circuit, subsequently considering the question has rejected the reasoning of White II and held that there is no admiralty jurisdiction over alleged asbestos-related personal injury claims in shipyard cases. Myrhan v. Johns-Manville Corporation, 741 F.2d 1119 (9th Cir. 1984) ("Myrhan"); Harville v. Johns-Manville Corp., 731 F.2d 775 (11th Cir. 1984) ("Harville"); Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir.), petition for cert. dismissed, ___ U.S. ___, 104 S.Ct. 34 (1983) ("Austin"); Owens-Illinois, Inc. v. United States District Court for the Western District of Washington at Tacoma, 698 F.2d 967

(9th Cir. 1983)("Owens-Illinois").* All of these courts have reached the same conclusion the court of appeals for the Second Circuit reached in Keene: shipyard workers' asbestos-related claims do not have the requisite significant relationship to traditional maritime activity to permit the exercise of admiralty jurisdiction.

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* Petitioners do not even attempt to distinguish the facts or the careful reasoning of Keene, Myrhan, Harville, Austin or Owens-Illinois. Instead, petitioners insist that these cases were all decided without the "benefit" of Director, Office Workers' Compensation Programs v. Perini North River Associates, 459 U.S. 297 (1983), a case which, according to petitioners, represents this Court's latest ruling on the limits of the district courts' admiralty tort jurisdiction pursuant to 28 U.S.C. §1333. As we demonstrate below, at pp. 28-35, infra, petitioners are wrong: Perini has nothing to do with the issue raised by the petition.

4. The Principles of Executive Jet and Its Progeny Mandate the Conclusion Reached By the District Court and the Court of Appeals: There is No Admiralty Jurisdiction Over Petitioners' Claims.

In assessing the substantiality of any relationship between the alleged wrong and traditional maritime activity under the Executive Jet test, most courts have considered some or all of the four factors first set forth in Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974): "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and type of injury; and traditional concepts of the role of admiralty law." 485 F.2d at 525. E.g., T.J. Falgout Boats, Inc. v. United States, 508 F.2d 855, 857 (9th Cir. 1974), cert.

denied, 421 U.S. 1000 (1975); Edynak v. Atlantic Shipping Inc., 562 F.2d 215, 220-21 (3rd Cir. 1977), cert. denied, 434 U.S. 1034 (1978); and Kayfetz v. Walker, 404 F. Supp. 75, 76-77 (D. Conn. 1975) (Lumbard, Cir. J.). Some or all of these factors were also utilized by the various courts of appeals in considering whether there is admiralty jurisdiction over shipyard workers' asbestos-related tort claims.*

Each of these four factors compels the same conclusion: the second prong of the Executive Jet test -- the "sig-

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* There was no issue below whether petitioners met the first prong -- the locality rule -- of the Executive Jet test, because respondents had assumed, for the purposes of the motion to dismiss only, that petitioners could satisfy the locality rule. (7a).

nificant relationship to traditional maritime activity" -- simply cannot be met in cases of shipyard workers' asbestos-related tort claims.

(a) The functions and roles of the parties. Shipyard workers engaged in ship construction and ship repair do not perform maritime roles such as would be the case with a member of a ship's crew engaged in nautical functions. For example, as the Ninth Circuit stated in Owens-Illinois,

> [p]laintiff's job, installing and cleaning up around the installation of asbestos, is hardly a distinctively maritime role, in contrast to the navigational functions of the crew of a ship engaged in ocean or river shipping.

Owens-Illinois at 970-71. What is crucial in assessing this factor is not merely the importance of plaintiffs'

activities to maritime commerce.

Harville at 784. Rather,

> the question properly asked is whether the actual tasks the workers perform bear any inherent relationship to maritime activity, that is, whether the plaintiffs' jobs are identical to those undertaken by land-based workers and are connected to maritime affairs merely because performed aboard ship, or whether they are tasks somehow unique to maritime service or work traditionally done by seamen . . . The plaintiffs here were engaged in trades, such as pipefitting, welding, and insulating, linked more with the land than with the sea. Their skills and training are those of landsmen, not of sailors.

Harville at 784-85 (citations omitted). The occupations at issue in the petitioners' cases (welders, machinists) are in the same category and the court of appeals for the Second Circuit reached the same conclusion below that

the Eleventh Circuit reached in Harville. (3a). Thus, petitioners' "'roles and function,' although related to maritime commerce, do not call for the application of admiralty jurisdiction." Harville at 785. See also Myrhan at 1122; Austin at 13-14.

(b) The types of vehicles and instrumentalities involved. That petitioners may have performed their duties in whole or in part upon ships does not, in and of itself, render their activities maritime. As the court of appeals pointed out, unlike the navigational equipment and safety devices of a vessel, "the instrumentalities central to [petitioners'] claims -- asbestos-containing products and the lack of safety equipment -- do not possess mari-

time attributes." (3a). See also Owens-Illinois at 971. "Nothing in the underlying claims would have been different if the plaintiffs had been employed constructing or repairing buildings on land. Consequently, the 'involvement' of vessels . . . is not strong support for the application of admiralty jurisdiction." Harville at 785; Myrhan at 1122.

(c) The causation and type of injury. The alleged cause (exposure to asbestos-containing products) of petitioners' injuries and the nature of their alleged injuries (asbestos-related diseases) are not distinguishable in degree or in kind from identical injuries sustained by persons exposed to asbestos-containing products in land-

based settings. As the court of appeals stated:

> "[T]he causation and types of [petitioners'] injuries are indistinguishable from the same injuries occurring in landbased settings."

(3a). See also Owens-Illinois at 971; Harville at 785; and Austin at 13. "The happenstance that [plaintiff] was exposed to asbestos aboard a ship does not transform exposure to asbestos into a maritime hazard." Myrhan at 1123.

(d) Traditional concepts of the role of admiralty law. The torts alleged by petitioners are not traditionally known in admiralty law; rather, they are garden variety state law claims. As Executive Jet and Foremost Ins. Co. v. Richardson remind us, the traditional purpose of federal admiralty

jurisdiction is to provide courts of special expertise for disputes involving navigation or water-based commerce, areas which require uniformity of law and of application. Petitioners' claims, however, do not involve navigation and to the extent they arise out of shipyard employment and therefore somehow implicate maritime commerce, that relationship is fortuitous and tangential. As the Eleventh Circuit concluded in Harville:

> Admiralty law is not concerned with claims such as those of plaintiffs. We can foresee no way in which a result in this case in favor of either the land-based shipyard workers or the asbestos manufacturing defendants will have any more than the most attenuated impact on maritime commerce. None of the issues that the Supreme Court listed in Executive Jet [quoted at pp.10-11, supra] are involved.

> Rather, the issues that this litigation presents are identical to those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution. Absent congressional action, the federal interest in these claims is insufficient to justify federal courts supplanting state law with the federal common law of admiralty [citing Executive Jet]. "In the situation before us, which is only fortuitously and incidentally connected to navigable waters . . . the [state] courts could plainly exercise jurisdiction over the suit, and could plainly apply familiar concepts of [state] tort law without any effect on maritime endeavors" [quoting Executive Jet at 273].

Harville at 786. See also Myrhan at 1122; Owens-Illinois at 971; Austin at 13.

In short, since petitioners cannot demonstrate that their claims bear a "significant relationship to traditional

maritime activity", admiralty jurisdiction does not lie.

5. Petitioners' Reliance on Perini Is Misplaced.

Petitioners claim that Director, Office Workers' Compensation Programs v. Perini North River Associates, 459 U.S. 297 (1983) ("Perini") is this Court's latest pronouncement on the subject of admiralty tort jurisdiction and that the five courts of appeals which have rejected admiralty jurisdiction over asbestos-related injury claims by land-based shipyard workers all erred by rendering their decisions "without the

benefit" of Perini.* Appellants are wrong.

Perini did not in any way alter admiralty tort jurisdiction. Perini involved a federal compensation statute, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq. ("LHWCA"); it was not a tort action brought under 28 U.S.C. §1333, the general admiralty jurisdiction statute at issue here.

The LHWCA was first enacted in 1927 affording rights of action which do not

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* Owens-Illinois and Keene were decided by the Ninth and Second Circuits respectively a few weeks after Perini. Austin was decided by the First Circuit over two months after Perini. Myrhan, Harville and Lowe were decided by the Ninth, Eleventh and Fifth Circuits respectively more than a year after Perini.

exist under general maritime law. Perini, 459 U.S. at 306-07. Prior to 1972, coverage under the LHWCA was provided to an employee of a statutory "employer" if the employee was injured while working upon navigable waters in the course of his employment. Perini, 459 U.S. at 311. However, in 1972 Congress altered the LHWCA's coverage in two ways: it expanded shoreward the geographical boundaries (the so called "situs") within which compensation coverage would be provided, 33 U.S.C. §903(a), and it brought within the statute's coverage persons "engaged in maritime employment" (the so called "status" test), 33 U.S.C. §902(3). Perini, 459 U.S. at 313-14. Upon reviewing the legislative history, the

Court concluded that Congress did not intend the 1972 amendments to the LHWCA -- a remedial statute entitled to liberal construction -- to withdraw coverage afforded to employees whose claims would have been covered under the LHWCA before the amendments. Rather, the new "status" test was inserted to describe affirmatively the additional class of employees newly covered by virtue of the amendments. Perini, 459 U.S. at 316-19.

This expansion of the LHWCA in no way affects the scope of admiralty jurisdiction and, in fact, is in marked contrast to the narrowing of that jurisdiction which was effected by Executive Jet.* Both the LHWCA and admiralty

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* As discussed above, Executive Jet did not reject the traditional "locality" (footnote continued)

jurisdiction cases employ tests which

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rule, but instead added to it an additional requirement (that the wrong bear a "significant relationship to traditional maritime activity"), Kelly v. United States, 531 F.2d 1144, 1146 (2nd Cir. 1976); Lowe at 1186. Petitioners argue that any claim historically cognizable in admiralty prior to Executive Jet must be cognizable in admiralty after Executive Jet (Petition, pp. 5-7). This is nonsense. By adding the "status" requirement to the "locality" rule, Executive Jet excluded from admiralty jurisdiction certain claims which would have been cognizable in admiralty prior to Executive Jet, when the traditional "locality" rule alone was applied. Indeed, the burden of petitioners' argument is that Perini nullifies Executive Jet.

Petitioners cite Grant-Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922), Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925), and Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923) for the proposition that injuries sustained by persons engaged in ship construction or repair aboard vessels in navigable waters are cognizable in admiralty (Petition, pp. 4-5). Petitioners' reliance on these cases is, of course, misplaced because they pre-

(footnote continued)

are frequently referred to, for the sake of brevity, as the "status" test. Although both of these "status" tests are designed to give meaning to the word "maritime," they are two different tests under two different statutes.* Contrary to petitioners' assertion that these two different "status" tests are "virtually

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date Executive Jet and under the then-existing law admiralty jurisdiction was determined on the basis of the locality rule alone.

* As the court of appeals noted, the "status" test under the LHWCA is the provision in 33 U.S.C. §902(3) that employees, for the purposes of statutory compensation coverage, are "persons engaged in maritime employment." (Emphasis added.) The "status" test for "admiralty or maritime" jurisdiction under 28 U.S.C. §1333 is the requirement of Executive Jet that admiralty jurisdiction recognizes claims which, in addition to satisfying the traditional "locality" rule, also "bear a significant relationship to traditional maritime activity." (4a).

identical", (Petition, p. 6), what is "maritime" for purposes of the LHWCA "status" test is not the same as what is "maritime" for purposes of admiralty or maritime jurisdiction under 28 U.S.C. §1333. In fact, the inapplicability of Perini and LHWCA cases to the question of admiralty jurisdiction was expressly underscored by this Court:

> Perini cites our decision in [Executive Jet] and argues that the LHWCA is premised upon admiralty jurisdiction, which requires a connection between an employee and traditional maritime activity. Perini's reliance on Executive Jet is misplaced. . . .
>
> . . . Although the term "maritime" occurs both in 28 U.S.C. §1333(1) and in §2(3) of the [LHWCA], these are two different statutes "each with different legislative histories and jurisprudential interpretations over the course of decades." Boudreaux v. American Workover, Inc., 680

F.2d 1034, 1050 (CA 5 1982) (footnote omitted).

Perini at 320, n.29. Thus, not only is Perini not, as petitioners claim, this Court's latest pronouncement on the "status" prong of the test of admiralty tort jurisdiction -- it is a case in which this Court went out of its way to discourage any such attempted interpretation.

In short, though petitioners argue that in deciding Perini the Court intended to construe admiralty jurisdiction and Executive Jet, the Court took pains to point out that it was doing no such thing. Neither Perini nor the scope of the LHWCA has any bearing on the scope of admiralty tort jurisdiction.

B. THE FOURTH CIRCUIT'S DECISION IN WHITE II IS NOT A SUFFICIENT BASIS FOR GRANTING CERTIORARI.

The question whether claims of injuries resulting from exposure to asbestos-containing products bear a substantial relationship to traditional maritime activity has been presented to this Court on petitions for writs of certiorari twice before. On the first occasion, the court of appeals for the Fourth Circuit had held in White II that there was a significant relationship to traditional maritime activity. On the second, the court of appeals for the Second Circuit held in Keene that there was no such significant relationship. In the latter instance, of course, the conflict between the circuits was a reason asserted for granting a writ of

certiorari. In neither instance did this Court grant certiorari.

As the court of appeals noted below in petitioners' cases, its ruling rests squarely on the authority of its prior decision in Keene. Since this Court denied certiorari in Keene, the only change in the configuration of the circuits is that several additional circuits have joined the line-up rejecting the reasoning and result of White II. At this time, the First, Second, Fifth, Ninth and Eleventh have all reached this conclusion. There has been no further support of White II from any other court of appeals.

Indeed, the Fourth Circuit, whose White II decision was the first by any court of appeals to address the question presented here and whose reasoning in

White II was rejected by each of the five courts of appeals which subsequently considered the issue, has recently granted a rehearing en banc in Oman v. Johns-Manville et al., Nos. 82-1821(L) and 82-2042, Order filed June 6, 1984, to consider whether its own decision in White II should be overruled. If the Fourth Circuit decides en banc to overrule its own decision in White II, it will remove any conflict among the circuits.

Because the legal circumstances have not changed since this Court denied certiorari in the very case on which the court of appeals for the Second Circuit based its decision in petitioners' cases, and because the only court of appeals whose decision creates a conflict among the circuits is considering

en banc overruling that decision, there is no reason to grant certiorari in the instant cases.

CONCLUSION

For the reasons stated above, the decisions below are consistent with the applicable laws and decisions of this Court. The reasons set forth in the petition are without merit and the petition should be dismissed.

February 4, 1985

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APPENDIX

Pursuant to Rule 28.1 of the Supreme Court of the United States, herewith follows a list of the respondent corporations with their respective parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

Respondent	
Celotex Corporation:	Jim Walter Corporation
Eagle-Picher Industries, Inc.:	none
GAF Corporation:	none
H.K. Porter Company, Inc.:	none
Keene Corporation:	Bairnco Corporation, Genlyte Group, Inc.
Nicolet Industries, Inc.:	Nu Nic Corp.

Owens-Corning Fiberglas Corporation:	Bayer-Owens-Corning Glass Wool, S.A. (Belgium)
	Veroc Technology A.S. (Norway)
	Fiberglas Canada, Inc.
	Fiberglas Colombia, S.A.
	San Vicente de Castellet (Spain)
	Scandinavian Glasfiber, A.B. (Sweden)
	Vitro-Fibras, S.A. (Mexico)
	Poly Plaster, S.A. (Brazil)
	Amiantit, Fiberglass Industries, Ltd. (Saudi Arabia)
	Asahi Fiber Glass Company, Ltd. (Japan)
	Polyarm, S.A. (Brazil)
Owens-Illinois Corporation:	Sunmaster Corporation

Companhia Industrial Sao Paulo e Rio
Vinta Santa Rita, Ltda.
Cristaleria Peldar, S.A.
Industrial de Materias, Primas, S.A.
Industrial de Vidrio Plano, S.A.
Metalicas Peldar, S.A.
Compania de Vidrios Owens-Illinois de Cuba, S.A.
Cristaleria del Ecuador, S.A.
Middle East Glass Manufacturing Co.
Hellenic-Owens Elefsis Glass Company, S.A.
P.T. Kangar Consolidated Industries
Union Glass and Container Corporation
Owens-Illinois de Puerto Rico
Consol Limited
United Glass Holdings, plc

U.G. Glass Containers
U.G. Closures and Plastics
The Rowenhead Company (U.G.)
Johnson Radley (U.G.)
Fabrica de Vidrio Los Andes, C.A.
Manufacturera de Vidrios Planos, C.A.
Gerresheim Group
St. George Recycling & Manufacturing, Inc.
Cristal-Owens Plastics Ltda.
Hygienic-Lily Limited
Sun-Lily Company, Ltd.
Emballages Laurent, S.A.
Papeteries d'Espaly S.A.R.L.
Papeteries Etienne, S.A.
Kraft, S.A.
Cajas Corrugadas de Mexico, S.A.

	Cajas y Empaques de Occidente, S.A.
	Cajas y Empaques del Pacifico, S.A.
	O-I Schott Process System, Inc.
	P.T. Igar Jaya
	Kimble Italiana, S.p.A.
	Envases de Borosilicato, S.A.
	Health Group, Inc.
	Durobar, S.A.
	Libbey - St. Clair
	Sasaki - Owens Glass Co., Ltd.
	Nippon Electric Glass Company, Ltd.
	Hankuk Electric Glass Co., Ltd.
Pittsburgh-Corning Corporation:	none

Raybestos-Manhattan, Inc.:	On June 28, 1982, Raymark Industries, Inc. merged with and acquired assets of Raybestos-Manhattan, Inc.
Raymark Corporation:	none
Raymark Industries, Inc.:	Raymark Corporation Joint ventures with Daikin-R-M Co., Ltd. and Itapso, S.A. de CV.
Southern Textile Corporation:	H. K. Porter Company, Inc.

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